(14)

IN THE

Supreme Court of the United States

October Term, 1944
No. 1021.

WALT DISNEY PRODUCTIONS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Answering Brief of Walt Disney Productions in Support of Petition for Writ of Certiorari.

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Statement of Facts.

The "Statement" found on pages 3 to 7 of the brief filed by counsel for the National Labor Relations Board in opposition to the petition for writ of certiorari calls for a further statement.

A most unfair picture is presented to this Court by the Board's "Statement." It is not only inaccurate, but it unjustly depicts the circumstances out of which the legal questions presented to this Court arose. It is difficult to ascertain why the Board's counsel found it necessary to present a biased "Statement," aside from its inaccuracies, unless it was intended to prejudice the reader of the petition in giving due consideration to the three legal propositions calling for review. These legal propositions are reviewable without the need for considering the detailed circumstances giving rise thereto. The circumstances are, therefore, immaterial to the proper consideration of this

petition. It was in this belief that Petitioner prepared the shortest possible "Statement" in its petition.

While we stated in our petition (page 3) that we believed a serious error had been committed by the Circuit Court of Appeals in this proceeding in adopting the view that it was bound by the findings of the Board, as it concluded that "there was some evidence in support of the material findings," we nevertheless recognized that the fact the findings are not supported by evidence is not a proper ground in support of a petition for certiorari. Such, however, does not justify the Board in stating the facts in an unfair and inaccurate manner.

One example of such unfairness and inaccuracy is the Board's statement (page 4) that

> "Petitioner violently and outspokenly opposed dealing with unions."

This is not supported by the Record. Petitioner's true attitude toward collective bargaining was accurately stated in a notice posted on all bulletin boards in the Studio two and one-half months before the strike occurred at the Studio. [R. 39, 751-752.] Said notice stated that:

> "The Company recognizes the right of employees to organize and to join in any labor organization of their own choosing, and the Company does not intend to interfere in this right. However, the law clearly provides that matters of this sort should be done off the employer's premises and on the employees' own time, and in such a manner as not to interfere with production.
>
> "Due to world conditions, the studio is facing a crisis about which a lot of you are evidently unaware. It can be solved by your undivided attention to production matters. This is an appeal to your sense of

fairness and I trust it will be sufficient to remedy the matter."

Again, in talks by Petitioner's president, recorded on discs, made to the assembled employees, this same attitude toward collective bargaining was announced. [R. 1238-1239; 1252-1253.] Petitioner's president there announced the policy, adhered to at all times, that the company had been and continued to be ready to bargain collectively with the appropriate bargaining unit designated by a majority of the employees by ballot in an election held for that purpose.

It is not inappropriate to point out that the Board's above-quoted statement as to Petitioner's attitude toward union matters is especially uncalled for. The Board had refused for many months to act upon Petitioner's application filed with the Board, that it hold an election to determine the proper bargaining unit with which Petitioner should bargain collectively. [R. 1220-1225.] Petitioner's application for such determination of the proper bargaining unit was filed with the Board about May 28, 1941, and remained unacted upon by the Board during the entire course of the strike at Petitioner's Studio, and for several months after the settlement of the strike. In November, 1941, the application was withdrawn. [R. 1223-1225.] The failure of the Board to exercise its jurisdiction to determine the proper bargaining unit, if not the major contributing cause of the strike at Petitioner's Studio, was, to say the least, one of the major reasons for the prolongation of the strike over many weeks.

It is true that the Board was willing to accept the testimony of Babbitt, despite the written and posted notices

of Petitioner's position concerning collective bargaining, that Babbitt had been told by Petitioner's president that: "If you don't cut out organizing my employees you are going to get yourself into trouble", and like statements. [R. 41.] However, it is obvious from reading the balance of the Record, which was totally disregarded by the Board, that Babbitt, in his zeal to establish his own case, purposely dropped from his testimony the phrase "on company property" or "on company time" after the words "organizing my employees." The written memorandum of February 6, 1941 above set forth, and the recorded speeches of Petitioner's president repeated the policy that: "However, the law clearly provides that matters of this sort should be done *off the employer's premises** and *on the employees' own time*, and in such manner as not to interfere with production." It is incredible that any warning by Petitioner's president or any other officer was anything other than for Babbitt to refrain from organizing on company property or on company time.

The Board's disregard of the pertinent evidence on this subject is demonstrated by its finding [R. 58] that:

> "Lessing's (one of Petitioner's vice presidents) above-quoted letter dismissing Babbitt in May, 1941, frankly admits that the *action was in punishment for his Union activities.*"

The truth is far from this finding, as shown by the actual discharge letter furnished Babbitt in May, 1941, which reads, on this point, as follows [R. 301]:

> "On February 6, 1941, all employees . . . were advised . . . that all union activities and matters

*Italics supplied throughout unless indicated to the contrary.

should be carried on *off the premises of the company and on the employee's own time* and in such manner as not to interfere with production.

"Since the promulgation of said rule and in fact prior thereto, despite repeated warnings, you have on numerous occasions engaged in union activities of various kinds and descriptions *on the company's time.*"

Here the Board itself, in its purported Findings, conveniently dropped the phrase "off the premises of the company and on the employee's own time."

Thus the finding that Petitioner's president threatened Babbitt in this connection is not based upon substantial evidence. Though it follows Babbitt's oral testimony, that witness clearly and purposely omitted the vital phrase embodying the Petitioner's policy of recognizing the right of union organization off the premises of the company and on the employees' own time, as evidenced by written poster and recorded speeches. The Board was not justified in disregarding such vital and undisputed evidence.

Nor is the Board justified in making a "Statement" in opposition to this petition based upon its finding, which, in turn, is lacking support from substantial evidence, particularly where the Board itself is guilty of dropping this vital phrase and hence of reaching erroneous and unsupported conclusions.

The foregoing is only one of the biased and inaccurate "facts" contained in the "Statement" in the Brief filed on behalf of the Board herein. The balance of the inaccuracies and misstatements are detailed in the Appendix accompanying this Reply Brief.

ARGUMENT.

I.

Grievance and Arbitration Provision of Collective Bargaining Agreement.

The Board has utterly failed to answer, indeed has not even mentioned, Petitioner's basic proposition that Section 10(a) of the Act has no application to this case. It will be recalled that the Petitioner's Brief (pp. 21-22) urges that Section 10(a) cannot apply to this case. The reason is, that it must first be proven that the alleged unfair labor practice is one "affecting commerce" before Section 10(a) has any bearing. Section 10(a) specifically so provides. Hence, when the alleged unfair labor practice is one which does not and cannot burden, interfere with or "affect interstate commerce," Section 10(a) is inapplicable. It is our contention, unanswered by the Board, that a dispute over an alleged wrongful discharge cannot constitute an unfair labor practice "affecting" commerce where there is an applicable collective bargaining agreement containing a grievance and arbitration provision requiring the settlement of all such disputes by arbitration, at least while the employer is ready and willing to have the dispute settled in accordance with such agreement.

Rather than answering our argument as to the inapplicability of Section 10(a), the Board simply asserts that Section 10(a) prevents the adoption of the rule for which we strenuously argue, namely that the Board has no jurisdiction to hear a charge of wrongful discharge until the parties have exhausted their remedy under the collective bargaining agreement which requires the parties to settle by arbitration all such disputes under an existing collective bargaining agreement. We respectfully urge that our

main contention for the adoption of this rule of law requiring exhaustion of such remedy by arbitration is entirely sound and is not defeated in any way by Section 10(a) of the Act when that Section is properly understood and when its limitation, namely "affecting" commerce, is given due and proper weight.

The reference in the Board Brief (p. 7) to the decision in *National Labor Relations Board v. Newark Morning Ledger Co.*, (C. C. A. 3) 120 F. 2d) 262, 268, cert. den. 314 U. S. 693, is of no aid whatever. That case did not involve the question here presented. There was *no* grievance and arbitration provision in the collective bargaining agreement involved in the *Newark Morning Ledger Co.* case. Hence, citation thereto is inappropriate.

II.

Board Must Prove That the Alleged Wrongful Discharge Either Encourages or Discourages Membership in a Labor Organization in Order to Establish an Unfair Labor Practice Within Section 8(3) of the Act.

The Fourth Circuit Court of Appeals has just rendered a decision squarely holding that there must be proof of an intent to discourage membership in a labor organization before there can be an unfair labor practice within the meaning of Section 8(3) of the Act. *National Labor Relations Board v. Draper Corporation* (C. C. A. 4, October 6, 1944) 145 F. (2d) 199, 202. The advance sheet report of this case was received by us subsequent to the preparation of our brief in support of our petition for certiorari. This decision fully supports the position of Petitioner in the instant proceeding and is squarely in conflict with the decision of the Ninth Circuit Court of Appeals herein. The

pertinent language of the Court in the *Draper Corporation* case is as follows:

> "It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of section 8(3) of the act. The great majority of the employees, who were members of the union continued to work; the company continued to recognize the union as the bargaining representative of its employees; the discharge and refusal to employ did not affect and could not have affected the status of the union as bargaining representative; and there is not a scintilla of evidence to support the conclusion that the discharge of the 'wild cat' strikers or the refusal to reemploy them encouraged or discouraged membership in any labor organization or was intended to have any such effect. Western Cartridge Co. v. N. L. R. B., 7 Cir., 139 F. (2d) 855."

The facts in the instant proceeding closely parallel those in the *Draper Corporation* case in that Petitioner has at all times continued to recognize the Union as the bargaining representative of its employees; has continued its closed-shop collective bargaining agreement with said Union; has continued to employ only members of the Union; the layoff of the employee in question did not affect and could not have affected the status of the Union as bargaining representative; and there is not a scintilla of evidence to support the Board's argument that his layoff encouraged or discouraged membership in any labor organization or was intended to have any such effect.

The *Draper Corporation* decision furnishes an additional and convincing reason why this Court should grant the petition and settle once and for all the final interpretation

of the Act on this important question. It is highly important in the due administration of the Act that this point be settled once and for all.

The Board, in effect, asks this Court to write out of the Act the express language whereby Congress made it an unfair labor practice to discriminatorily discharge an employee *only* where such discrimination was done with the purpose and effect "to encourage or discourage membership in any labor organization." The Board asks the Court to adopt the view announced by the Ninth Circuit Court of Appeals in this case, that, in effect, every discriminatory discharge amounts to an unfair labor practice, even though there is no evidence whatever that it had any purpose or effect of encouraging or discouraging membership in a labor organization.

We submit that the quoted language adopted by Congress must be given its ordinary meaning and effect. There is no such thing in the Act as an unfair labor practice by a mere discriminatory discharge. The discriminatory discharge must be coupled with the purpose and effect of encouraging or discouraging membership in a labor organization before it falls within the purview of the Act. Otherwise, the language of Congress is rendered meaningless.

The Board's attempt to distinguish the language of decisions in the Circuit Courts of Appeals which fully support the position of Petitioner on this point, and which are in direct contradiction to the decision of the Ninth Circuit Court of Appeals in this proceeding, is futile. The conflict is apparent to anyone who gives a fair reading to the decisions cited on this point in our Brief.

III.

Selective Training and Service Act.

Despite the argument found in the Board's Brief (pages 14-17), the fact remains that the order for reinstatement of Babbitt upon his discharge from the service, is "punitive" and not "remedial." To this extent it violates the holdings of this Court which have consistently compelled the Board to adhere to the rule that its order should be remedial and not punitive.

While the Board makes the unsupported assertion that the form of this order is necessary in order to afford a full remedy to the employee in question, the Board fails to show how this is true. The Board's argument rests with a mere assertion. It fails to make any showing that the order is not punitive.

The order in question is certainly punitive. It compels Petitioner to reemploy a person who enlisted in the armed services in November, 1942, and who has been continuously in the service since that date and still remains in service. Approximately 2-½ years have expired, during which time the employee has been prevented, through no action of Petitioner, from performing his employment duties.

If he had not been laid off in November, 1941, and had remained in Petitioner's employ until he enlisted, the employment relationship would have terminated without any obligation of reemployment, except for the legislation of Congress embodied in the Selective Training and Service Act. The sole legal right of reemployment, then, is de-

pendent exclusively upon the Act of Congress. Hence, if the Board's order requires reemployment of Babbitt under the exact terms and conditions of the Selective Training and Service Act, he will be placed in precisely the same position he would have been in had there been no layoff in November, 1941. Thus a full and complete remedy is afforded to him by conditioning the order of reemployment upon the terms and limitations of the Selective Training and Service Act. Any additional obligation of reemployment imposed by the Board's order constitutes a mere punishment of Petitioner, is patently disciplinary and is thus erroneous, in view of the principle uniformly adhered to by this Court in reviewing Board orders. The Congress has not delegated to the Board any authority to increase the rights of reemployment of a former employee who has gone into the service in excess of those rights established by the Selective Training and Service Act. Where Congress has fixed the extent of the rights of reemployment of such persons, the Board has no delegated authority to enhance those rights in the form of a punitive order. The Board's authority is simply to see that the employee is given such a remedy as will put him in the same position he would have occupied but for the alleged unfair labor practice. (The argument under this Paragraph III with regard to the Selective Training and Service Act is made without in any way waiving the contentions of Petitioner that the Board's order is unenforcible as pointed out under Paragraphs I and II of Petitioner's Brief and this Reply Brief.)

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be granted in order for this Court to review important questions of law presented by this proceeding and in order to settle a uniform rule of interpretation of Section 8(3) of the Act, in view of the existing conflict of decisions amongst the various Circuit Courts of Appeals.

Respectfully submitted,

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